PPES Resorts Sdn Bhd v Keruntum Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 62 OF 1989
HAIDAR J
4 NOVEMBER 1989

Civil Procedure — Interlocutory injunction — Power to grant — Whether court can restrain the institution of legal proceedings — Quia timet injunction — What must be shown — Specific Relief Act 1950, ss 50 & 54

Civil Procedure — Writ — Power of court to strike out indorsement of writ

The defendants were, in 1983, given a timber licence for the Long Akah area. However, on 5 April 1988, the defendants were asked to show cause why the said licence should not be cancelled under s 51A(1) of the Forests Ordinance (Cap 126). On 18 August 1988, the licence was cancelled and the defendants were given one week to surrender the licence to the Director of Forests. On 28 September 1988, the defendants sought the leave of the High Court for an order to quash the decision cancelling their licence. On 1 November 1988, the court granted the defendants leave to apply for an order of certiorari and further ordered that such leave operate as a stay against the Minister of Resource Planning in respect of all acts touching the grant of any licence over the area in question. On 10 November 1988, the order was served on the Minister.

Unfortunately, on 30 September 1988, the Director of Forests had issued the plaintiffs with forest timber licences nos T/0339 and T/0340 covering part of the area given earlier, under the first-mentioned timber licence, to the defendants. The defendants came to know of the plaintiffs' logging activities in January 1989. They wrote to the forest officer and the Director of Forests seeking clarification of the plaintiffs' rights. The plaintiffs, learning of the defendants' letter, wrote to the defendants' solicitors through their own solicitors informing the defendants that should they choose to apply for an injunction stopping the plaintiffs' logging operations, the plaintiffs would want to be heard and therefore the application should be inter partes.

On 19 April 1989, the defendants' solicitors wrote to the plaintiffs' solicitors warning the plaintiffs to stop the extraction of timber in the said forest area and threatening legal action. But before the defendants could do anything further, the plaintiffs applied for and obtained a quia timet injunction prohibiting the defendants from instituting or maintaining any action against the plaintiffs. The defendants applied to set aside the injunction on the grounds that the court had no jurisdiction to issue the quia timet injunction in the way that it did and that the plaintiffs had not made full and frank disclosure. In addition, the defendants further applied to strike out parts of the statement of claim.

Held, dismissing the defendant's application:

(1) The power of the court to grant an injunction is contained in s 50 of the Specific Relief Act 1950. While s 54 of the Act states that a court cannot grant an injunction staying proceedings in a court not subordinate to it, the wording of the section does not prevent a court from granting an injunction in the nature of a quia timet to restrain the *instituting or prosecuting* of proceedings. The court therefore had jurisdiction to grant the interim injunction in the way that it did.

(2) The licences to the plaintiffs were issued before the plaintiffs obtained leave of the court to apply for the order of certiorari and before the order for stay was issued against the Minister for Resources. As the order had no retrospective effect and as the plaintiffs had nothing to do with the dispute between the defendants and the licensing authorities, they should be allowed to continue their operations in the licensed area without hindrance.

(3) A quia timet injunction is a proceeding by which the court is enabled to prevent its jurisdiction from being stultified. To obtain a quia timet injunction, the applicant must show that there is an imminent danger of substantial damage being suffered, and that it will be impossible for the applicant to protect himself if the injunction is not granted. The plaintiffs had shown that they had expended a sizeable amount of money thus far and that their losses would therefore be considerable. They had also shown that given the defendants' solicitors' letters of warning, there was a real danger of the defendants applying for an injunction and had thus satisfied the requirements for a quia timet injunction.

(4) An interlocutory injunction is merely provisional in its nature, and does not conclude a right. In an application for an interlocutory injunction, the court interferes on the assumption that the party who seeks its interference has the legal right which he asserts. The applicant is not required to make out a clear title and the mere existence of a doubt as to the applicant's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction. The plaintiffs had clearly shown their legal right to work on the licensed forest areas and in the circumstances, the defendants' application to set aside the injunction failed.

(5) The power of the court to strike out parts of the indorsement of a writ is clear. There were, however, no valid grounds to grant the defendants' application. The plaintiffs had a valid licence issued to them by the proper authorities. To grant the defendants' application would be to determine issues which were in dispute, at an interlocutory stage.

Cases referred to

1 *Cotton Corp of India Ltd* v *United Industrial Bank Ltd* AIR 1983 SC 1272 (refd)
2 *Re Anderson-Berry*; *Harris* v *Griffith* [1928] Ch 290 (follld)
3 *Li Shing Garments Manufacturing Sdn Bhd* v *Kwong Hing Trading Sdn Bhd* (unreported) (follld)
4 *Fletcher* v *Bealey* (1885) 28 Ch D 688 (follld)
5 *Si Rusa Beach Resort Sdn Bhd* v *Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132 (refd)
6 *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors* [1983] 1 MLJ 407 (follld)
7 *Day* v *William Hill (Park Lane)* [1949] 1 KB 632 (follld)

Legislation referred to

Specific Relief Act 1950 s 50, 54

JC Fong (*HC Sim* with him) for the plaintiff.
Colin Lau for the defendant.

Cur Adv Vult

Haidar J: The defendants, Keruntum Sdn Bhd ('Keruntum') filed by way of summons-in-chambers dated 18 May 1989 (encl 21) for an order:

(1) that the statement of claim herein be struck out on the grounds that there is no cause or reasonable cause of action, that it is frivolous and/or vexatious, or that it is an abuse of process of the court;

(2) that alternatively, if the court rules that the statement of claim is not to be struck out, the time to file and serve the defence is extended one week from the date of such ruling;

(3) further and alternatively, that the order of the temporary injunction granted herein and dated 18 April 1989 be discharged on the grounds that this honourable court has no jurisdiction to grant the temporary injunction, alternatively that the plaintiff fails to show that the defendants' intended action is an abuse of the court's process or on the ground of material non-disclosure or on other grounds as stated in the affidavit of Lim Yew Yuat *alias* Lim Jew Juat affirmed on 18 May 1989;

(4) in the further alternative, if this honourable court decides to maintain the said interlocutory injunction, for an order that all proceeds from the date of the timber or logs felled and/or extracted from the alleged licensed area (less due and reasonable operational costs properly accounted) be paid into court or into a joint account of the solicitors of the plaintiffs and defendants and a further order that representatives from the defendants be allowed to check on the number of logs felled and extracted at the log ponds or at any exit points of the licensed area until the final determination of this action or the other action intituled as Originating Motion No KG 16 of 1988, whichever is the earlier;

(5) that if the said interlocutory injunction is discharged as in prayer (1) or prayer (3) above, an inquiry/assessment be made as to the damages sustained by the defendants by reason of the said injunction so soon after the hearing of this application according to the undertaking of the plaintiffs contained in the said order, and for interest thereon pursuant to statute and/or the Rules of the High Court 1980 at a rate to be fixed by this honourable court;

(6) that the defendants be at liberty to enter judgment against the plaintiffs for the amounts of such damage and interest;

(7) that the costs of this application be the defendants' costs in any event.

The main prayers of Keruntum are prayers (1) and (3), the rest are ancillary prayers. In support thereof, an affidavit by Lim Yew Yuat *alias* Lim Jew Juat, a director of Keruntum (encl 21) was filed. Another affidavit in opposition was affirmed on 17 July 1989 by Lucy Lao, Keruntum's secretary (encl 36).

The plaintiffs, PPES Resorts Sdn Bhd ('PPES') gave notice of its intention to resist Keruntum's summons-in-chambers by relying on three affidavits filed therein, namely, the affidavits of Leslie Majoribanks (a director of PPES) dated 17 April 1989 and 3 July 1989 and the affidavit of Leo Chai (Director of Forests) dated 11 June 1989. PPES earlier on filed an ex parte summons-in-chambers dated 17 April 1989 (encl 4) for an order:

> That Keruntum, its agents or servants be restrained until further order of the court from instituting or from maintaining any action in this court against PPES in respect of PPES's forest timber licences nos T/0339 and T/0340 and/or PPES's rights to fell, extract and remove timber from the forest areas covered by such licences.

The grounds of the application are contained in the affidavit of Leslie Majoribanks dated 17 April 1989. On 18 April 1989, the court granted the ex parte application of PPES for a quia timet injunction against Keruntum (encl 6).

At the hearing of Keruntum's application, Mr Colin Lau amended his prayer (1) by confining the striking out to only paras 8, 9, 10 and prayer 11(ii) of PPES's statement of claim and prayer (2) was abandoned as the statement of defence had been filed by Keruntum on 20 May 1989 (encl 23). Mr Colin Lau elected to submit on prayer (3) first, that is, setting aside the temporary injunction granted on 18 April 1989 and to be followed by the striking out of certain paragraphs of the statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('RHC').

Brief facts as to the background of the dispute over the forest areas between the parties are as follows: Keruntum was given a timber licence no T/0279 ('timber licence') to fell, extract and sell timber logs in the Long Akah area. The timber licence was expressed to commence on 10 October 1983 and due to expire on 9 October 2008. It was issued under s 55 of the Forests Ordinance (Cap 126) by the Director of Forests with the approval of the then Minister of Forestry (see exh L-1 to encl 21). On 5 April 1988, Setiausaha Tetap, Kementerian Perancangan Sumber, on behalf of the Minister, issued a show cause letter to Keruntum as to why the timber licence should not be cancelled under and by virtue of the powers vested in him (the Minister) under the new s 51A(1) of the Forests Ordinance, as amended by the Forests (Amendment) Ordinance 1987 which came into effect on 1 January 1988 and pursuant to sub-s 2 thereof, Keruntum was given one month to do so. (See exh L-2D.) Keruntum, by letter dated 3 May 1988 (exh L-2C), replied to L-2D. On 18 August 1988, Setiausaha Tetap, Kementerian Perancangan Sumber, responded to L-2C and cancelled the timber licence pursuant to s 2(2)(b) read with s 51A(1) of the Forest Ordinance as amended and gave Keruntum one week to surrender the timber licence to the Director of Forests (see exh L-2B). On 25 August 1988, Keruntum, through its director, wrote in response to L-2B by alleging that the purported cancellation was ultra vires, illegal and void and intimated therein that it would be taking out process in court to quash the purported cancellation (see exh L-2A).

On 28 September 1988, Keruntum filed an ex parte application to seek leave of the court for an order of certiorari to quash the decision of the Minister cancelling its timber licence vide Originating Motion No KG 16 of 1988 (see exh L-3). The ex parte originating motion and the statutory statement in accordance with the RHC were sent to the State Attorney General and the Federal Attorney General on 25 October 1988 (see exh L-4).

On 1 November 1988, the court heard the ex parte originating motion of Keruntum and leave was granted by the court with an order:

(a) that the applicant (Keruntum) be and is hereby granted leave to apply for an order of prohibition prohibiting the first respondent (Minister of Resource Planning), its servants or agents from granting any forest timber licence and/or permit over the licensed area delineated in the said forest timber licence no T/0279 except in accordance with cl 16 of the said forest timber licence no T/0279;

(b) that such leave as aforesaid do operate as a stay against the first respondent in respect of all acts touching and concerning the grant of any licence and/or permit over the licensed area comprised in forest timber licence no T/0279 except in accordance with cl 16 of the said forest timber licence no T/0279 until hearing and disposal of the substantive motion to be filed herein. (See exh L-5.)

On 10 November 1988, Keruntum served the order (L-5) on the Minister of Resource Planning and the government of the state of Sarawak through their agents. Similarly, the State Attorney General and the Federal Attorney General were served with copies of L-5. Surprisingly though, L-5 was also published in the Sarawak Government Gazette on 5 January 1989 and I do not know under what authority. A check by the senior assistant registrar at my direction, with the government printer, showed that it was Keruntum through its advocates, who sent L-5 for gazetting and again I do not know for what objective and purpose. As far as I know, there is no legal requirement for Keruntum to do so. I made the inquiry because both counsels disclaimed any knowledge of the said gazette.

In the meantime PPES, a limited company incorporated in Sarawak under the Companies Act 1965 and a wholly-owned subsidiary of the Sarawak Economic Development Corporation, was issued forest timber licence nos T/0339 and T/0340 ('timber licences') by the acting Director of Forests with the concurrence of the Minister for Forestry conferring exclusive rights and privileges to fell, extract and remove merchantable timber from two forest areas, viz the Akah Buman Stateland and the Akah Patah Stateland areas respectively near Long Akah in the Baram District of Sarawak. The timber licences were issued on 30 September 1988 and are valid for a period of ten years ending on 29 September 1998. PPES has been issued permits to enter coupe by the Forest Department. Consequently, PPES through its contractor, agents or servants, eg Equatorial Timber Holding Sdn Bhd and Shin Yang Sdn Bhd, proceeded to survey, construct infrastructural facilities including roads, bridges, timber, camps, log, ponds and/or storage yards in connection with the felling, extraction and removal of timber from the said forest areas. Extraction and removal of timber logs from the said areas commenced in October 1988 and are still continuing. The timber licences of PPES covered part of the area given earlier under the timber licence to Keruntum which was allegedly revoked by the Minister.

Keruntum claimed it came to know of the logging operations in the said forest areas comprised in the timber licence allegedly revoked, sometime in January 1989 whereby Keruntum lodged a police report on 26 January 1989 seeking police assistance and investigation and to stop the third parties from working on its alleged licensed area. (See exh L-7.) Since there was no action from the police, Keruntum wrote a letter to the section forest officer in Miri with a copy to the Director of Forests seeking clarification of the third parties' rights etc on the said forest areas (see exh L-8). Whilst Keruntum was waiting for a reply from the forest department, PPES' solicitors, Reddi & Co, by a letter dated 13 April 1989, notified Keruntum that PPES has been properly licensed by the government of Sarawak to extract timber from part of the forest concession area in Long Akah, Baram District (see exh L-10). Reddi & Co in L-10 put Kerutum to notice that in the event Keruntum wanted to file an injunction to stop PPES from operating on PPES's licensed areas, PPES would want to be heard and therefore the application must be done inter partes.

On 19 April 1989, Keruntum's solicitors wrote a reply (L-11) to L-10 and warned PPES to stop extraction of timber from the said forest areas in view of the court order of stay (L-5). However, before Keruntum could commence legal proceedings, including seeking an interlocutory injunction against PPES, PPES 'slapped' Keruntum with a quia timet injunction order on 20 April 1989 (encl 6) prohibiting it from instituting or maintaining any action in the court against PPES. At this juncture, it should be noted that the pre-emptive action of PPES was taken because it would appear that Keruntum's solicitors did not respond to PPES' solicitors' letter (L-10) notifying it that any application for injunction by Keruntum should be heard inter partes as PPES would like to be heard, but instead Keruntum warned PPES to stop logging operations in the said forest area.

As I said earlier, the application of Keruntum is grounded on two main prayers:

(i) Paragraphs 8, 9, 10 and prayer II(ii) of the statement of claim of PPES be struck out.

(ii) The order of interlocutory injunction granted on 18 April 1989 be discharged or set aside.

As Mr Colin Lau elected to submit on ground (ii) first, I will therefore deal with the said ground. Under this ground,

Mr Colin Lau raised the following issues:

(1) Does this court have any jurisdiction to issue a quia timet injunction as it did?
(2) If so, should the quia timet injunction be maintained or set aside?

(1) *Does the court have any jurisdiction to issue a quia timet injunction as it did?*

It is to be observed that had Keruntum responded to the notice issued by PPES' solicitors vide L-10 that PPES be notified of Keruntum's intended application for injunction against PPES and that PPES be heard accordingly, PPES perhaps would not have proceeded with the application of the quia timet injunction. Instead, Keruntum vide L-11 threatened PPES as per para 2 as follows:

> Since your client admits extracting in our client's licensed area, we have been instructed to inform you that unless your client or its agents or servants stop extracting timber forthwith, our client shall be constrained to take all necessary legal actions *including an injunction to prevent further extraction.* (Emphasis added.)

Faced with such a situation, it would appear that PPES decided, if I may describe it, 'to draw the gun first' by obtaining the quia timet injunction against Keruntum. Be that as it may, has the court the jurisdiction to grant such an injunction?

Now, the power of the court to grant an injunction, temporary or perpetual, is provided under s 50 of the Specific Relief Act 1950 ('SRA') and such power is a discretionary one. I do not think that it is seriously disputed that a quia timet injunction is a form of an interlocutory injunction, that is, until the determination of PPES' legal rights vis-a-vis Keruntum's legal rights over the forest area that is in dispute. In fact I would venture to say that Keruntum's proposed action and the present action of PPES would in effect be based on more or less similar facts and the court eventually determining as to who has the legal rights to the forest area in question.

Section 54 of the SRA prescribes the situation and circumstances when an injunction cannot be granted by the court. Mr Colin Lau relied on s 54(b) to support his contention that the court has no jurisdiction to grant the quia timet injunction. Section 54(b) reads:

> An injunction cannot be granted:
> (a) ...
> (b) *to stay proceedings* in a court not subordinate to that from which the injunction is sought;

Mr Colin Lau cited the case of *Cotton Corp of India* v *United Industrial Bank*[1] in support of his contention.

Our s 54(b) of the SRA is in pari materia with the old Indian s 56(b). In the Indian *Cotton Corp* case,[1] the Supreme Court there was in fact dealing with the interpretation of s 41(b) which replaced the old s 56(b) when it said at p 1274:

> A very narrow question which we propose to examine in this appeal is: Whether in view of the provision contained in s 41(b) of the Specific Relief Act 1963 ('Act' for short) the court will have jurisdiction to grant an injunction restraining any person from instituting any proceeding in a court not subordinate to that from which the injunction is sought? The contention may be elaborated thus: Can a person be restrained by an injunction of the court from instituting any proceeding which such person is otherwise entitled to institute in a court not subordinate to that from which the injunction is sought? In the facts of the present case, the narrow question is whether the corporation can be restrained by an injunction of the court from presenting a winding-up petition against the bank? The High Court seems to hold that the court has such powers, ... This position is seriously contested by the appellant in this appeal.

The new Indian s 41(b) reads:

> An injunction cannot be granted —
> (a) ...
> (b) *to restrain any person from instituting or prosecuting any proceedings* in a court not subordinate to that which the injunction is sought. (Emphasis added.)

In the course of considering s 41(b), the Supreme Court considered the interpretation given to the old s 56(b) by the courts in India. At p 1278, Desai J said:

> It is true that giving a literal meaning to the provision contained in s 56(b) which directs the power to the court to grant injunction to stay proceedings in a court not subordinate to that from which injunction is sought, the court demarcated the unoccupied area by holding that even if the court cannot grant injunction to the stay proceeding, *it can certainly injunct a party from instituting or prosecuting a proceeding in a court not subordinate to that which the injunction was sought.* (Emphasis added.)

The Indian legislature amended s 56(b) by the new s 41(b) nullifying such interpretation so that it becomes crystal clear that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction was sought. However crystal clear it would seem on the provision of s 41(b), the Supreme Court nevertheless commented at p 1277:

> There is an unresolved controversy whether a court can grant an injunction against a person from instituting or prosecuting a proceeding before itself but that is not relevant in the present circumstances and we do not propose to enlarge the area of controversy.

The above comment would appear to be relevant to the present case. Be that as it may, in the absence of clear and unambiguous language in our s 54(b), do I then in considering the interpretation of our s 54(b) give effect to what is now the interpretation given to the Indian s 41(b)? To do so, to my mind, would be tantamount to the court usurping the functions of the legislature for which I should not be disposed to do. True, access to justice must not be hampered even at the hands of the judiciary. But here PPES alleged that the threatened act of Keruntum in instituting a suit including injunction against PPES is of

such a character that it must inevitably result in injury to its legal rights over the forest area in which it said that timber licences were properly given to them to operate by the appropriate authorities and hence PPES contended that it is entitled to an injunction restraining Keruntum from doing such act even though no damage has actually occurred. Mr Colin Lau submitted that by way of comparison of the wordings in our s 54(a) and (b), the absence of the word 'pending' in s 54(b) would imply that 'proceeding' in s 54(b) includes instituting proceeding and thus will be in consonance with the Indian s 41(b). However, as I said earlier, in the absence of clear and unambiguous wording in our s 54(b), I should not venture or for that matter be hypnotized by the Indian decisions and legislation when the judicial pronouncements on s 41(b) of the Indian Specific Relief Act 1963 are of no relevance since there is no equipollent provision in our country. Our s 54(b) does not expressly refer to initiation or institution of proceedings as in the Indian s 41(b). On a grammatical interpretation of the section, it would be open to the court to spell out a power to grant an injunction to restrain a person from instituting a proceeding because what is barred by the statute is an injunction to stay proceedings in a court not subordinate to that from which the injunction is sought. If the intention of the legislature is to abrogate the powers of the court in granting an injunction to restrain a person from instituting or prosecuting a proceeding in a court not subordinate to that which the injunction is sought, then there should be clear and unambiguous words as those in the Indian s 41(b). In my view, it is best that this matter be left to the wisdom of our legislature as it thought fit to do, that is, whether an amendment on the line of the Indian s 41(b) should be made or not. By way of example, is the court powerless to grant a quia timet injunction in respect of intended actions by the 'busybody' litigants. If it is so, the courts may be flooded with useless cases in court thereby wasting unnecessary judicial time. A quia timet injunction is a proceeding by which the court is enabled to prevent its jurisdiction from being stultified. (See *Harris* v *Griffith*.[2]) In my view, the present wordings of our s 54(b) does not muzzle the court in any way from granting an interlocutory injunction in the nature of quia timet to restrain a person from instituting or prosecuting a proceeding. On the no jurisdiction issue, Shankar J, in the unreported case of *Li Shing Garments Manufacturing Sdn Bhd* v *Kwong Hing Trading Sdn Bhd*[3] had the occasion to consider the case of *Cotton Corp of India Ltd* v *United Industrial Bank*,[1] relied on by Mr Colin Lau where at pp 5 and 6, his Lordship stated:

> 17 Mr Sri Ram, counsel for Kwong Hing, submitted initially on the strength of s 54(b) of the Specific Relief Act 1950 that this court had no jurisdiction to entertain Li Sheng's application. He contended that to grant the injunction would be tantamount to staying the proceedings of a court which was not of subordinate jurisdiction. He claimed that the case of *Cotton Corp of India Ltd* v *United Industrial Bank Ltd* AIR 1983 SC 1272 demonstrated the fallacy of the argument that s 54(b) did not inhibit the court from granting an injunction to restrain a party from initiating or continuing with proceedings in a court of co-ordinate jurisdiction but that it only precluded the court from directing such an injunction to the other court. The view taken in India was that such an approach would defeat the real objective of the Indian equivalent of s 54(b) and therefore the language of the Indian equivalent was amended to bring the statute in line with what was originally intended.
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> 18 Relying on the passages contained in the judgment at p 1278, he argued that the effect of the Malaysian statute now was specifically to exclude the court from entertaining the plaintiff's application at all. He also exerted that the words of the statute excluded the inherent jurisdiction of the court and also any other residuary power, vested in the court of a similar nature which could be exercised by the High Court in England. (Section 23(2) of the Judicature Act and the parallel powers conferred by the Courts Act 1948.)
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> 19 I am unable to agree that s 54(b) of the Specific Relief Act 1950 muzzles the court in this way ...

I agree with my learned brother that s 54(b) of the SRA does not in anyway muzzle the court from granting a quia timet injunction in an appropriate case. Here, Keruntum should first establish its legal rights under OM No KG 16 of 1988 which are yet to be determined, and in the absence of that, it cannot now purport to assert its legal rights in proposing to take proceedings against PPES when such legal rights over the forest areas are yet to be established. In *Fletcher* v *Bealey*,[4] Parson J explained the law as to actions quia timet as follows:

> There are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed the damage will be suffered, I think it must be shown, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.

In this case, PPES had satisfied the two necessary ingredients, that is, the letter from Keruntum of the threatened injunction order and para 7 (an expenditure of $300,000 per day without considering other substantial financial commitments on the part of PPES) and para 12 (Keruntum's paid-up capital of $10,000) of the affidavit of Leslie Majoribanks dated 17 April 1989 (encl 4).

In the result, I would rule that the court has jurisdiction to grant the interim injunction as it did and since it is my view that s 54(b) of the SRA does not in any way muzzle the court in granting a quia timet injunction, the submission of Mr Colin Lau that 'where there can be no perpetual injunction, there can be no temporary injunction' cannot be sustained. I fully subscribe to the views that 'inherent power of the court cannot be invoked to

nullify or stultify a statutory provision' (see p 1273 of the Indian *Cotton Corp* case[1]). But here the court is not invoking the inherent powers of the court.

Having thus ruled that the court has the power to grant the interlocutory injunction, I next have to consider whether there are valid grounds for me to set aside the interlocutory injunction granted to PPES.

(2) *Should the quia timet injunction be maintained or set aside?*

Mr Colin Lau submitted that the interlocutory injunction should be set aside by me on the grounds:

(a) that the onus is on PPES to demonstrate that on the available evidence Keruntum's intended action is bound to fail or is frivolous;
(b) that there has been non-disclosure of material facts.

Both counsel dwelt at length on the facts and law regarding whether Keruntum's intended action is bound to fail and also the OM No KG 16 of 1988 filed by Keruntum and the effects thereof. In my view, I should refrain from considering and deciding on the facts and the law as far as possible as to do so would amount to me deciding on the facts and law in OM No KG 16 of 1988 and the present suit and it is best, I think, that the facts and the law be properly determined and decided upon at the proper hearing of OM No KG 16 of 1988 and the present suit. It suffices for me at this juncture only to say that the timber licences to PPES were issued *before* Keruntum obtained leave of the court to apply for the order of certiorari and *before* the order for stay was issued against the Minister for Resource Planning. If Keruntum elected to file the application for certiorari late and slept on its rights, then it has itself to be blamed for the timber licences to be given to PPES. At most, the Minister of Resource Planning and Director of Forests may have only knowledge of the notice of Keruntum that it intended to challenge the revocation of its licence in a court of law (encl L-2A) though Mr Fong submitted that they had no knowledge of this fact. I do not agree that the Minister of Resource Planning and the Director of Forests had no knowledge of the intended action of Keruntum because to accept the submission of Mr Fong would signify that the 'setiausaha tetap' kept the letter of Keruntum's in which it indicated its intention to challenge the validity of the Minister's decision on the revocation of its timber licence (exh L-2A) close to his chest when it is a very important matter that should be his (setiausaha tetap) paramount duty as an officer to disclose or bring to the attention of his superior, ie the Minister, at least, if not the Director of Forests, of the contents of L-2A; otherwise it may amount to dereliction of duty on the part of the 'setiausaha tetap'. I am of the view that L-2A must have been brought to the attention of the appropriate authorities as can be seen from the speed with which the timber licences were issued to PPES. Be that as it may, the reason put forth that the timber licences were issued after the time set by the Forest Ordinance for appeal by Keruntum to the Yang Di Pertua Negeri against the Minister's decision to cancel Keruntum's licence had lapsed, would seem to be plausible and would not perhaps amount to mala fide on the part of the licensing authorities. As the order obtained by Keruntum has no retrospective effect, the effects of such order, including possible contempt, are, I think, matters for consideration in OM No KG 16 of 1988.

What is clear, in my view, is that Keruntum's licence was revoked and as such Keruntum could no longer operate the forest areas granted under the revoked licence until such time as the challenge of the revocation of the licence by Keruntum is determined by the court in OM No KG 16 of 1988. Whether Keruntum succeeds or not in OM No KG 16 of 1988 is an open question and it is not for me at this juncture to speculate. On the other hand, PPES were given the timber licences according to the Forest Ordinance and PPES therefore claimed that it should not be precluded from exercising its rights under the timber licences validly given to them, at least not until the determination of OM No KG 16 of 1988 or the present suit. Whatever dispute there is between Keruntum and the licensing authorities is not the concern of PPES. It would appear therefore that Keruntum's intended action here could very well come within the purview of frivolity and abuse of the process of the court, intending to have two parallel actions to determine its legal rights over the disputed forest areas when in so far as the present action is concerned, PPES is asserting that it had valid timber licences and PPES should not be precluded from its operations of the licensed areas. To this end, it may be appropriate to cite the case of *Si Rusa Beach Resort Sdn Bhd* v *Asia Pacific Hotels Management Pte Ltd*[5] where the Federal Court held:

> ... the learned trial judge was correct in holding that there were serious questions to be tried in this case but he failed to consider that at all material times the appellant was in possession and control of the hotel. If the status quo is to be maintained, the only order that could be properly made is to allow the appellant to continue to run the hotel until the action is finally litigated and a decision made thereon.

In the present action, PPES is in possession of the forest areas with the permits to enter the coupe by the forest department and the timber licences issued to it and as such I am of the view that PPES should be allowed to continue with the operations of the forest areas granted to it without hindrance until the determination of Keruntum's action in OM No KG 16 of 1988 or the present suit. In the event that Keruntum were to succeed in OM KG No 16 of 1988 or the present suit, then it is a matter for the authorities and PPES to sort out the problem arising therefrom. On this ground, I would say that the interlocutory injunction should not be set aside.

Non-disclosure of material facts:

Mr Colin Lau submitted that PPES, in its application for interlocutory injunction, did not set out the facts fully and accurately and thereby has not disclosed all material facts. A perusal of the affidavit of Leslie Majoribanks dated 17 April 1989 in support of the application of PPES would show by way of exh 'E' (letter from Keruntum) at para 3 thereof as follows:

> As the matter of cancellation of timber licence no T/0279 is in the court, we regard such activities as unlawful. Hence we have been advised to take out injunction proceedings against such persons.

Though the facts may not be fully and accurately set out therein, it is in my view sufficiently brought to the attention of the court vide exh 'E' read together with paras 10, 11, 12 and 13 of Leslie Majoribanks' affidavit (encl 4). In any event, the short answer to Keruntum's allegation of non-disclosure of material facts can be found in the case of *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors*[6] where Hashim Yeop A Sani J (as he then was) said:

> An interlocutory injunction is merely provisional in its nature, and does not conclude a right. It is said that a person who comes to the court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges. It can be seen that in an application for an interlocutory injunction the court interferes on the assumption that the party who seeks its interference has the legal right which he asserts. A man who seeks the aid of the court must be able to show a fair prima facie case in support of the title which he asserts. He is not required to make out a clear legal title. It is sufficient if he satisfies the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal rights, the exercise of which he seeks to present. It has also been accepted that the mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction.

Here, clearly PPES had, through the affidavit of Leslie Majoribanks and the exhibits annexed thereto, like the timber licences etc, shown its legal rights to work on the licensed forest areas.

I would, in the circumstances, rule that Keruntum fails on this ground to get the court to set aside the interlocutory injunction.

Even assuming that if Keruntum were to succeed in OM No KG 6 of 1988, can Keruntum be adequately compensated? Looking at the affidavit of Leslie Majoribanks in encl 4, it is not disputed that PPES and/or its contractors expended a considerable sum of money, ie to the tune of $109,659,000 by capital outlay on machinery and equipment apart from construction of roads at an estimated cost of $4m. Further, it is not disputed that PPES is a company backed by the State of Sarawak Corporation and as such, I think, PPES could adequately compensate Keruntum in the event Keruntum succeeds. On the opposite side, if Keruntum fails, in view of its capital of $10,000 only, it would be well-nigh impossible for it to adequately compensate PPES in view of the large sums running into millions of ringgit that had been expended by PPES. I do not see the necessity or the practicality of Keruntum's application as per its para 4 of the summons for all proceeds to be paid into court or into a joint account of the solicitors for both parties. Whatever the proceeds of PPES are can be verified from the records with the forest department and as a limited company, PPES has to maintain a proper account and the fears of Keruntum in this respect, in my view, are unfounded and does not justify my making the order as prayed by Keruntum.

In the result, I am of the opinion that Keruntum can be adequately compensated as opposed to PPES being adequately compensated for the reasons set out by me earlier, and further, as PPES had valid timber licences (unless ruled otherwise) or the court ruled in favour of Keruntum in OM No KG 16 of 1988, the status quo should be maintained and the balance of convenience lies in favour of PPES.

Application by Keruntum under O 18 r 19 of the RHC

The power of the court to strike out parts of the indorsement of writ is clearly stated by Singleton LJ in *Day* v *William Hill (Park Lane)*[7] as follows:

> It is clear that under the inherent jurisdiction of the court there is power to strike out part of an indorsement on a writ.

I would say straightaway that looking at the statement of claim of PPES I see no valid grounds to grant the application prayed for by Keruntum as it is clearly established that PPES had valid timber licences issued to it by the proper authorities until otherwise determined by the court and that they are now operating on the licensed areas and have expended considerable sums of money. In my view, to grant Keruntum's application would in effect be to determine issues which are in dispute at an interlocutory proceeding. As I said earlier, the quarrel between Keruntum and the licensing authorities is a matter to be sorted out between them and PPES has got nothing to do with it and neither is PPES a party to such dispute.

Keruntum's application to strike out certain paragraphs of PPES' statement of claim is clearly not sustainable in view of my decision on the setting aside of the interlocutory injunction and at most, the said application may have its merits only in respect of para 9(d) which may be scandalous and completely irrelevant and wholly unnecessary for the due prosecution of the action and I would accordingly order that para 9(d) of PPES' statement of claim be struck out.

In the result, Keruntum's application, except in so far as the order striking out para 9(d) of PPES' statement of claim, is dismissed with costs to PPES.

Application dismissed.

Solicitors: *Reddi & Co Advocates; Szetu & Co Advocates.*

Reported by *Mathavan Devadas*

Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 643 OF 1985
KC VOHRAH J
26 OCTOBER 1989

Damages (Personal Injury or Death) — Dependency claim — Liability admitted — Quantum of damages for loss support — Civil Law Act 1956, s 7

On 3 October 1982, Alex Mathew ('the deceased') died as a result of a collision between his car and a motor lorry of the first defendant which was driven by the second defendant. His wife and two children brought an action to recover damages under s 7 of the Civil Law Act 1956 as dependants against the defendants. At the hearing, the claim of the second plaintiff ('the son') was dropped as he has since died. Liability was admitted by the defendants. The issue before the court was the calculation of the quantum on damages by reference to the loss suffered by the first and the third plaintiffs as a result of the death of the deceased.

Held:
The approach to be taken in this case was to find the net income of the deceased and deduct from that a percentage representing the deceased's personal living expenses; the remainder is the value of the dependency for the plaintiffs.

Cases referred to
1 *Chan Heng Wah & Anor* v *Peh Thiam Choh & Anor* [1986] 2 MLJ 175; [1988] 1 MLJ 74 (folld)
2 *Lita Maddox* v *Calito C Guinto & Anor* [1987] 2 MLJ 757 (refd)

Legislation referred to
Civil Law Act 1956 s 7

Alex Anthony for the plaintiffs.
Bala Mahesan for the defendants.

Cur Adv Vult

KC Vohrah J: Alex Mathew died as a result of a collision on 3 October 1982 between his car and a motor lorry of the first defendant which was driven by the second defendant. His wife and two children brought an action to recover damages under s 7 of the Civil Law Act 1956 as dependants against the defendants, but at the hearing, the claim of the second plaintiff (the son) was dropped as he has since died. What remains is the case of the third plaintiff (hereinafter the 'wife') who remarried on 1 February 1988 and that of the first plaintiff (hereinafter the 'daughter') who is now 10 years old and living with her mother in India.

Liability being admitted by the defendants, it is now necessary to calculate the quantum of damages by reference to the loss suffered by these two plaintiffs as a result of the death of Alex Mathew. In regard to special damages, this has been agreed at $2,140.

As regards the dependency claim, the wife's claim, it is agreed, is from the date of the death of Alex Mathew (3 October 1982) to the date she remarried (1 February 1988), a period of 63 months. Part of the daughter's claim will be over the same period and both counsel agree that the award for this period would be 75% in favour of the wife and 25% the daughter.

Both counsel have also agreed that the additional period in respect of the daughter's dependency for the pre-trial period would be the intervening period between the date of her mother's remarriage and the date of trial, this being 21 months. As for the post-trial period, both counsel agree that it should be eight years.

I now come to the lost support to the two dependants in monetary terms. Counsel for the plaintiffs advocates the totalling up of all the moneys spent by the deceased from his earnings on the plaintiffs in order to calculate the loss of the value of the dependency. This would involve the tedious process of adding up all sorts of sundry expenditure which in most circumstances would be based on guess work. And in the present case, the evidence is too scanty to be of help to the court for it to arrive at a sensible sum using the approach that is advocated.

With respect, in the circumstances of this case, I think the more sensible approach is the one advanced by counsel for the defendants; find the net income of the deceased and deduct from that a percentage representing the deceased's personal living expenses; the remainder is the value of the dependency for the plaintiffs. He cites the Singapore case of *Chan Heng Wah* v *Peh Thiam Choh & Anor*[1] which went on appeal to the Court of Appeal as an example of this approach. The Singapore case is concerned with an estate claim and there is an exhaustive examination of relevant authorities in both the High Court and the Court of Appeal judgments as regards the approach to be taken in deducting living expenses of a deceased; the clear conclusion is that the approach of deducting a percentage leaving the remainder as surplus income for the dependants is a modern trend for both estate and dependency claims. To my mind, such a practical and sensible approach can safely be adopted in this case, there being no contrary local structures and no circumstances in this case against such an approach.

Available documents and oral evidence show earnings and major deductions in respect of Alex Mathew for